

I-1700 TRUSTS**I-1710 GENERAL INFORMATION****Definitions**

Annuity – a contract or agreement by which one receives fixed non variable payments on an investment for a lifetime or a specified number of years. Refer to [I-1634 Types of Resources \(SSI-Related\)](#).

Beneficiary – a person for whose benefit the trust is created.

For the benefit of/on behalf of – consider a trust established “for the benefit of” an individual if payments of any sort from the corpus or income of the trust are paid to another person or entity so that the individual derives some benefit from the payment. Likewise, consider payments to be made “on behalf of”, or “to or for the benefit of” an individual, if payments of any sort from the corpus or income of the trust are paid to another person or entity so that the individual derives some benefit from the payment. For example, such payments could include purchase of food or shelter, or household goods and personal items that count as income. The payments could also include services for medical or personal attendant care that the individual may need which does not count as income.

For the sole benefit of – consider a trust established “for the sole benefit of” an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life.

Income beneficiary – a beneficiary to whom income is payable, presently, conditionally, or in the future, or for whom it is accumulated, or who is entitled to the beneficial use of corpus (principal) presently, conditionally, or in the future, for a time before its distribution.

Individual – the term “individual” includes the individual himself or herself, as well as:

- the individual's spouse, where the spouse is acting in the place or on behalf of the applicant/enrollee;
- a person, including a court or administrative body, with legal authority to act in place of or on behalf of the

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- individual or the individual's spouse; and
- any person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

Inter Vivos Trust – a trust established during the lifetime of the settlor. It may also be referred to as a “living trust.”

Irrevocable Trust - a settlor does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his or her own support and maintenance. Although termed irrevocable, a trust which provides that the trust can only be modified or terminated by a court is a revocable trust.

Payment – any disbursement from the corpus (principal) of the trust or from income generated by the trust which benefits the party receiving it.

Principal beneficiary – a beneficiary presently, conditionally, or ultimately entitled to corpus (principal).

Revocable Trust – a settlor may revoke a trust in whole or in part only if he has reserved the right to revoke the trust or an unrestricted right to modify the trust. Modification, division, termination, or revocation of a trust shall be by authentic act or by act under private signature executed in the presence of two witnesses and duly acknowledged by the person who makes the modification, division, or termination or by the affidavit of one of the attesting witnesses; a trust that will terminate if a certain circumstance occurs during the lifetime of the beneficiary, such as the beneficiary leaving the nursing facility and returning home.

Settlor (also referred to as “grantor” or “trustor”) – The person who creates the trust. A person who subsequently transfers property to the trustee of an existing trust is not a settlor.

Testamentary Trust – a trust established by a will and effective at the time of the testator's death.

Trust – any arrangement in which a settlor transfers property to a trustee or trustees to be held, managed, or administered by the trustee(s) for the benefit of the settlor or certain designated individuals (beneficiaries).

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Trustee – A person to whom the title to the trust property is transferred in order for the property to be administered by him as a fiduciary.

Trust instrument – the written document creating the trust and all amendments and modifications thereof; verification for a Testamentary or Inter Vivos Trust.

Verification for a Testamentary or Inter Vivos Trust

Request the following:

1. Copy of the trust agreement;
2. Copy of the will, if the trust is a testamentary trust; and
3. Statements from the financial institution, trust management company, and attorney as to the value of the trust corpus at the first moment of the first day of the month(s), the amount and frequency of income produced by the trust, and the amount of corpus and income available to the Individual.

Review the trust and determine if the trust:

1. Is a testamentary or inter vivos trust;
2. Is revocable or irrevocable;
3. Was established by someone other than the Individual, such as a spouse, parent, grandparent, etc.;
4. Was established with the assets of a third party;
5. Restricts the Individual's access; or
6. Names the Individual as the trustee.

Based on the review, count the value of the corpus of the trust as an available resource if the trust is a testamentary or inter vivos trust and the:

1. Trust is revocable; and
2. Individual is named as the trustee and can use the money for his or her own benefit.

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Based on the review, do not count the value of the corpus of the trust as an available resource if the trust is a testamentary or inter vivos trust and the:

1. Individual is not the trustee of the trust; and
2. Individual's access to the trust is restricted (i.e. only the trustee or the court may withdraw the corpus).

Additionally, the corpus of the trust is not counted as an available resource to the individual, even if the:

1. Legal guardian is the trustee;
2. Trust provides a regular, specified payment/disbursement to the Individual; or
3. Trust provides for discretionary withdrawals by the trustee.

I-1720 **MEDICAID QUALIFYING TRUST**

A Medicaid Qualifying Trust (MQT) is a trust established prior to August 11, 1993 which:

- is established with the applicant/enrollee's own funds by the applicant/enrollee, spouse, guardian, or legal representative, or is established on behalf of an applicant/enrollee who has a cognitive impairment or intellectual disability using his/her own funds by the legal guardian on or after April 7, 1986;
- names the applicant/enrollee as the trust beneficiary of all or part of the payments from the trust; and
- permits the trustee to exercise any discretion with respect to the distribution of such payments to the individual.

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Prior to April 7, 1986, an applicant/enrollee could use the trust mechanism to shield his own funds from being counted for Medicaid purposes. Therefore, these trusts were called Medicaid Qualifying Trusts. The applicant/enrollee could create a trust with his own funds and give discretion to the trustee concerning distribution of trust funds. The applicant/enrollee, therefore, no longer had access to the funds. The penalty for transfer of resources could be applied. The value of the trust was not counted after any penalty period had expired.

Trusts set up in this manner, whether created before or after April 7, 1986, are now counted as resources even though they are still called Medicaid Qualifying Trusts.

Exception:

A trust established prior to April 7, 1986 with the enrollee's own funds solely for the benefit of an enrollee who has a cognitive impairment or intellectual disability residing in an ICF/ID facility is not considered a Medicaid Qualifying Trust.

Count as a resource the maximum amount that could be distributed to the trust beneficiary under the terms of the trust, if the trustee exercised his full discretion.

If a Medicaid Qualifying Trust is revoked or if the full amount of the principal of the trust is actually distributed to the applicant/enrollee, it is no longer a Medicaid Qualifying trust. These assets must then be examined to determine the countable value according to policy for that particular type of resource.

The trust rules of the SSI cash assistance program (refer to [I-1634 Types of Resources \(SSI-Related\)](#)) are used to evaluate the impact on Medicaid eligibility of trusts established prior to August 11, 1993 that do not meet the definition of a Medicaid Qualifying Trust.

I-1730**TRUSTS ESTABLISHED AFTER AUGUST 11, 1993**

The Omnibus Budget Reconciliation Act of 1993 (OBRA 93) included new requirements applicable to the treatment of trusts

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established on or after August 11, 1993. This policy does not apply to trusts established with assets that did not belong to the individual. Regardless of when the trust was established, refer to applicable cash assistance policies to determine the impact on Medicaid eligibility of trusts established with the assets of someone other than the individual. Trusts established before August 11, 1993 with the individual's assets are subject to the rules at **I-1710**.

OBRA 93 requirements apply to eligibility determinations and post eligibility determinations for all individuals, including cash assistance recipients and others who are otherwise automatically eligible and whose income and resources are not ordinarily measured against an independent Medicaid eligibility standard.

The requirements apply to trusts without regard to:

- the purpose for which the trust is established;
- whether the trustee(s), has or exercises any discretion under the trust;
- any restrictions on when or whether distributions can be made from the trust; or
- any restrictions on the use of distributions from the trust.

Any trust which meets the basic definition of a trust can be counted in determining eligibility for Medicaid. No clause or requirement in the trust, no matter how specifically it applies to Medicaid or other Federal or State programs, i.e. exculpatory clause, precludes a trust from being considered.

The trust provisions apply to all applicants/enrollees, whether in an institutionalized setting or not. However, the penalty period for transfers of assets into irrevocable trusts applies only to a person in an institutional setting.

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Individuals to Whom Trust Provisions Apply

This policy applies to any individual who establishes a trust and who is an applicant/enrollee of Medicaid. An individual is

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considered to have established a trust if **:

- the trust was established on or after August 11, 1993;
- the individual's assets were used to form all or part of the corpus of the trust; and
- the trust was established by the individual, the individual's spouse, any person, including a court or administrative body, with legal authority to act on behalf of or in place of the individual or individual's spouse, or any person, including a court or administrative body, acting upon the discretion or the request of the individual or the individual's spouse.

If the trust corpus includes assets of another person as well as of the individual, the prorated amounts of income and resources based on the proportion of the individual's assets shall be used in determining countable income and resources in the trust for eligibility and post-eligibility purposes.

Treatment of Revocable Trusts **

Use the following criteria to determine how a revocable trust is counted for eligibility purposes.

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- the entire corpus of a revocable trust is counted as an available resource to the individual.
- any payments from the trust made to or for the benefit of the individual are counted as income to the individual. Refer to 3 of [I-1670](#) for definition of Income.
- any payment from the trust which are not made to or for the benefit of the individual are considered assets disposed of for less than fair market value.

If a portion of a **revocable trust** is treated as a transfer of assets for less than FMV, the look-back period is extended to sixty (60) months.

Example:

Mr. Baker establishes a **revocable** trust with a corpus of \$100,000 on March 1, 2006, enters a nursing facility on November 15, 2009, and applies for Medicaid February 15, 2010. The trustee has the complete discretion in disbursing funds from the trust. Each month the trustee disburses \$100

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as an allowance to Mr. Baker and \$500 to a property management firm for the upkeep of Mr. Baker's home. On June 15, 2006, the trustee gives \$50,000 from the corpus to Mr. Baker's brother. The \$100 personal allowance and \$500 for the upkeep of the home are counted as income for Mr. Baker. Because the trust is revocable, the entire value of the corpus is considered a resource. However in June the trustee gave away \$50,000. Only the remaining \$50,000 is countable as a resource to Mr. Baker. The \$50,000 given to Mr. Baker's brother is treated as a transfer of resources for less than fair market value.

Treatment of Irrevocable Trusts

If there are any circumstances under which payment from an irrevocable trust could be made to or for the benefit of the Individual, then:

- payments from income or from the corpus made to or for the benefit of the individual are treated as income to the individual;
- income on the corpus of the trust which could be paid to or for the benefit of the individual is treated as a resource available to the individual;
- the portion of the corpus that could be paid to or for the benefit of the individual is treated as a resource available to the individual; and
- payments from income or from the corpus that are made but not to or for the benefit of the individual are treated as a transfer of assets for less than fair market value.

Example:

Mr. Baker establishes an **irrevocable** trust with a corpus of \$100,000 on March 1, 2006, enters a nursing facility on November 15, 2009 and applies for Medicaid February 15, 2010. The trustee has the discretion to disburse the entire corpus and all income from the trust to anyone, including the grantor. Each month the trustee disburses \$100 as an allowance to Mr. Baker and \$500 to a property management firm for the upkeep of Mr. Baker's home. The \$100 personal allowance and \$500

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for the upkeep of the home are counted as income for Mr. Baker. In June the trustee gave away \$50,000. The remaining \$50,000 is countable as a resource to Mr. Baker since there are circumstances under which payment of this account could be made to Mr. Baker. The \$50,000 given to Mr. Baker's brother is treated as a transfer of resources for less than fair market value.

If the trust is **irrevocable** and if all or a portion of the corpus or income on the corpus of a trust cannot be paid to the individual under any circumstances, treat all or any such portion or income as a transfer of assets for less than fair market value.

The date of the transfer is considered to be:

- the date the trust was established; or
- if later, the date on which payment to the individual was foreclosed.

For transfer of asset purposes, use the value of assets in the trust on the date the trust is established or payment is foreclosed. If the trustee or the grantor adds funds to the trust after the dates listed above, the addition of funds is considered to be a new transfer of assets, effective on the date the funds are added.

If all or a portion of an **irrevocable trust** is treated as a transfer of assets for less than FMV, the look-back period is extended to sixty (60) months.

Example:

Using the facts of the previous **irrevocable** trust example except the trustee is prohibited by the trust from disbursing any of the corpus of the trust to or for Mr. Baker. Again the \$100 and \$500 (which come from income to the trust) are counted as income for Mr. Baker. Because none of the corpus can be disbursed to Mr. Baker, the entire value of the corpus at the time the trust was created (\$100,000) is treated as a transfer of resources for less than fair market value. The \$50,000 given to Mr. Baker's brother does not alter the amount of the transfer upon which the penalty is based. If Mr. Baker places an additional \$50,000 in the trust, none of which can be disbursed to him, is treated as an additional transfer of assets.

I-1730**continued****Payments Made from Revocable or Irrevocable Trusts to, or on Behalf of, an Individual**

Payments are considered to be made to the individual when any amount from the trust, from the corpus or income produced by the corpus, is paid to the individual or to someone acting on his/her behalf.

Circumstances Under Which Payments Can or Cannot Be Made

To determine whether payments can or cannot be made from a trust to or for an individual, consider any restrictions on payments, such as use restrictions, exculpatory clauses, or limits on trustee discretion.

Example:

If an irrevocable trust provides that the trustee can only disburse \$1000 to or for an individual out of a \$20,000 trust, only the \$1,000 is treated as a payment that could be made. The remaining \$19,000 is treated as an amount which cannot, under any circumstances, be paid to or for the benefit of the individual. However, if a trust contains \$50,000 that the trustee can pay to the grantor only in the event that the grantor needs, for example, a heart transplant, the full \$50,000 is considered as payment that could be made under some circumstance and thus the full \$50,000 is considered an available resource to the individual.

Placement of Excluded Assets in Trust

Placement of an excluded asset, with the exception of the home of an institutionalized individual, in a trust does not change the excluded nature of that asset; it remains excluded. Because 1917(e) of the Social Security Act provides that the home is not an excluded resource for institutionalized individuals, placement of the home of an institutionalized individual in a trust results in the home becoming a countable resource.

I-1730**continued****Use of Trust vs. Transfer Rules for Assets Placed in Trust**

Placement of a non-excluded asset in a trust generally results in a transfer of assets for less than fair market value. Because the trust provisions are more specific and detailed in their requirements for dealing with funds placed in a trust, evaluate assets placed in trust exclusively under trust policy, which may in some instances require that trust assets be treated as a transfer for less than FMV.

Legal Instrument or Device Similar to a Trust

Any legal instrument, device, or similar arrangement which may not be called a trust under Louisiana law, but which is similar to a trust in that it involves a settlor who transfers property to a trustee. This can include (but is not limited to) annuities, escrow accounts, investment accounts, pension funds, certain Uniform Transfer to Minors Act (UTMA) accounts and other similar devices managed by an individual or entity with fiduciary obligations. For instruction on treatment of these types of accounts, see the appropriate section in this Manual.

I-1740**EXCEPTIONS TO COUNTING TRUSTS ESTABLISHED
AFTER AUGUST 11, 1993**

Policy **I-1730** regarding how a trust is counted for eligibility determination purposes does not apply to Special Needs Trusts (SNT) or Pooled Trusts as described below. Trusts that meet the exception requirements are treated differently in determining eligibility for Medicaid. Funds entering and leaving these trusts are treated according to the rules of the applicable cash assistance program, i.e. LIFC or SSI.

Treatment of Special Needs Trusts

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To qualify as a Special Needs Trust under Section 1917(d)(4)(A) of the Social Security Act and as an exception to the general rule of a trust as a countable resource, the trust must contain the following elements:

- a. Assets of an individual under age 65;

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To qualify for the special needs trust exception, the trust must be established for the benefit of an individual with disabilities under age 65. This exception does not apply to a trust established for the benefit of an individual age 65 or older. If the trust was established for the benefit of an individual with disabilities prior to the date the individual attained age 65, the exception continues to apply after the individual reaches age 65.

b. Additions to the trust after age 65:

Additions to or augmentation of a trust after age 65 (except as outlined below) are not subject to this exception. Such additions may be income in the month added to the trust depending on the source of the funds and may be counted as resources in the following months under regular SSI trust rules.

Additions or augmentation do not include interest, dividends or other earnings of the trust or a portion of the trust meeting the special needs trust exception. If the trust contains the irrevocable assignment of the right to receive payments from an annuity or support payments made when the trust beneficiary was less than 65 years of age, annuity or support payments paid to a special needs trust are treated the same as payments made before the individual attained age 65 and do not disqualify the trust from the special needs trust exception.

c. Benefits the individual:

Under the special needs trust exception, the trust must be established for and used for the benefit of the individual with disabilities. SSA has interpreted this provision to require that the trust be for the sole benefit of the individual. Other than trust provisions for qualifying third party payments and reasonable expenses of administration related to the trust, any provisions that:

- provide benefits to others or entities during the individual's lifetime, or
- allow for termination of the trust prior to the individual's death and payment of the corpus to another individual or entity (other than the State(s) or another creditor for

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payment for goods or services provided to the individual) will result in disqualification for the special needs trust exception.

d, Who established the trust;

The special needs trust exception does not apply to a trust established through the actions of the individual with disabilities himself or herself. To qualify for the special needs trust exception, the assets of the disabled individual must be put into a trust established through the actions of the individual's:

- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

In the case of a legally competent, adult with disabilities, a parent or grandparent may establish a "seed" trust using a nominal amount of his or her own money, or an empty or dry trust. After the seed trust is established, the legally competent adult with disabilities may transfer his or her own assets to the trust, or another individual with legal authority (e.g., power of attorney) may transfer the individual's assets into the trust.

In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust by a court is not sufficient.

Note:

The person establishing the trust with the assets of the individual or transferring the assets of the individual to the trust must have legal authority to act with respect to the assets of that individual. Attempting to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of the Individual will generally result in an invalid trust. A power of attorney (POA) is legal authority to act with respect to the assets of an individual with disabilities. However, a trust established under a POA will result in a trust we

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consider to be established through the actions of the individual himself or herself.

e. State Medicaid reimbursement requirement;

To qualify for the special needs trust exception, the trust must contain specific language that provides that upon the death of the individual, the State of Louisiana shall receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State of Louisiana's claim shall be considered a privilege on the succession estate, and shall have a priority equivalent to an expense of last illness as prescribed in Civil Code Article 3252 et seq.

The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback may not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust.

Note:

Labeling the trust as a Medicaid pay-back trust, OBRA 93 pay-back trust, trust established in accordance with 42 U.S.C. § 1396p, or as an MQT, etc. is not sufficient to meet the requirements for this exception. The trust must contain language substantially similar to the language above. An oral trust cannot meet this requirement.

Non-Assignable Income Added to Trusts

Certain payments are non-assignable by law and, therefore, are income to the individual entitled to receive the payment. They may not be paid directly into a trust, but individuals may attempt to structure trusts so that it appears that they are so paid. Non-assignable payments include:

- Temporary Assistance to Needy Families (TANF)/Aid to Families with Dependent Children (AFDC);

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- Railroad Retirement Board-administered pensions;
- Veterans' pensions and assistance;
- Federal employee retirement payments (CSRS, FERS) administered by the Office of Personnel Management;
- Social Security Title II (RSDI) and SSI payments; and
- Private pensions under the Employee Retirement Income Security Act (ERISA) (29 U.S.C.A., Section 1056(d)).

Assignable Income Added to Trusts

A legally assignable payment that is assigned to a trust/trustee is income unless the assignment is irrevocable. For example, child support or alimony payments paid directly to a trust/trustee as a result of a court order are not income. If the assignment is revocable, the payment is income to the individual legally entitled to receive it.

Pooled Trusts

A pooled trust is a trust containing the assets of an individual under age 65 who is disabled as defined by the SSI program that meets the following conditions:

- the trust is established and managed by a non-profit association;
- a separate account is maintained for each beneficiary of the trust, but for purposes of investment and management of funds, the trust pools the funds in these accounts;
- accounts in the trust are established solely for the benefit of individuals with disabilities, by the individual, the parent, grandparent, legal guardian of the individual, or by a court; and
- to the extent that any amounts remaining in the beneficiary's account upon the death of the beneficiary

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are not retained by the trust, the trust pays to the State(s) the amount remaining in the account up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State Medicaid plan(s).

A specific exemption exists for transfers of funds into trusts for persons with disabilities under the age of 65. Although, a pooled trust can be established for individuals age 65 or older, there is no exemption from transfer of asset provisions for funds placed in a pooled trust for individuals age 65 or older. Transfer of assets rules apply to pooled trusts established for individuals age 65 or older.

Miller-Type or Qualifying Income Trusts

Miller-Type or Qualifying Income Trusts are applicable in a State only if the State's Medicaid plan provides Medicaid to individuals eligible under a special income level (SIL) but does not provide Medicaid for nursing facility services to the medically needy.

Thus, Miller-Type or Qualifying Income Trusts were applicable in Louisiana effective July 1, 1996 through June 30, 1997 due to the State's termination of the Title XIX Medically Needy Program coverage plan.

Effective July 1, 1997, Miller-Type or Qualifying Income Trusts are no longer applicable due to the re-implementation of a Title XIX Medically Needy Program.

Post-Eligibility Treatment of Income

Income Not Placed in a Miller Trust - Income retained by the individual is income to the individual according to SSI policy. Thus, such income is subject to the post-eligibility rules.